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August 2, 2010

Via email @ <http://www10.tceq.state.tx.us/epic/efilings>

Office of Chief Clerk
ATTN: Agenda Docket Clerk
Texas Commission on Environmental Quality
MC-105
P.O. Box 13087
Austin, Texas 78711-3087

RE: City of Fair Oaks Ranch
Docket No. 2010-0835-MWD
Permit No. WQ0011867001

Dear Agenda Docket Clerk:

Attached for filing in the above-referenced docket is City of Fair Oaks Ranch's Response to Hearing Request/Request for Reconsideration.

Very truly yours,



Celina Romero

Attachment

cc w/Attachment:

Dan Kasprovicz/City of Fair Oaks Ranch (via fax 210-698-0900)
Paul Schroeder/Alamo Consulting (via fax 210-824-3055)
Christine Angeletti, Staff Attorney/TCEQ Executive Director (via fax 512-239-0606)
Brian K. Sierant, Technical Staff/TCEQ Executive Director (via fax 512-239-4430)
Blas J. Coy, Jr., Attorney/TCEQ Public Interest Counsel (via fax 512-239-6377)
Bridget Bhoac, Director/TCEQ Office of Public Assistance (via fax 512-239-4007)
Jody Daniel/Requester (via regular mail)
Franz & Gisela Hallermann (via regular mail)

**TCEQ DOCKET NO. 2010-0835-MWD
TCEQ PERMIT NO. WQ0011867001**

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| APPLICATION FOR RENEWAL BY CITY OF FAIR OAKS RANCH | § § § § § | BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY |
|---|-----------------------|---|

**CITY OF FAIR OAKS RANCH'S
RESPONSE TO HEARING REQUEST/REQUEST FOR RECONSIDERATION**

Comes now the City of Fair Oaks Ranch ("the City") and files this response to the Hearing Request and Request for Reconsideration by Mr. Jody Daniel, the hearing requestor in this case ("the Hearing Requestor"), and in support states the following:

I. Background

The City filed an application to renew Permit No. WQ0011867001 with TCEQ on August 10, 2009. The TCEQ declared the application administratively complete on September 11, 2009. The City published Notice of Receipt and Intent to Obtain a Water Quality Permit in the *Boerne Star* on September 29, 2009. The City published the Notice of Application and Preliminary Decision in the *Boerne Star* on January 8, 2010. The public comment period ended on February 8, 2010.

During the public comment period, one person, the Hearing Requestor, filed written comments, a request for public meeting, and a request for a contested case hearing. On April 20, 2010, the Executive Director ("the ED") issued a decision letter indicating that in his opinion the application meets the requirements of applicable law. He noted that his decision did not authorize construction or operation of any proposed facilities and that, unless a timely request for contested case hearing or reconsideration was received, the ED would act on the application and would issue the permit. On May 20, 2010, the Hearing Requestor filed a Request for

Reconsideration of the ED's denial of his earlier request for a public meeting and a contested case hearing.

II. Hearing Request and Request for Reconsideration Are Without Merit

The Hearing Request and Request for Reconsideration are without merit. The ED fully considered and adequately responded to the comments of the Hearing Requestor on the application in the ED's Response to Comments. He determined that no changes were necessary in response to comments. In addition, by letter dated February 24, 2010, the ED determined that no public meeting was necessary because there was not a substantial or significant degree of public interest in the application, there had been no request for same by an elected official, and a public meeting in this instance was not otherwise required by law. Moreover, in this case, there is no right to a contested case hearing. This application is a "no change" renewal and such applications may be granted without a contested case hearing.

Accordingly, because the comments of the Hearing Requestor have been adequately addressed and taken into consideration, because the ED has determined that a public meeting is not warranted, and because there is no right to a contested case hearing on this application, this Request for Reconsideration should be denied.

III. There Is No Right to a Contested Case Hearing on a "No Change" Renewal of a Water Quality Permit

The Texas Water Code provides that the TCEQ may approve an application to renew a permit without holding a public hearing under the following circumstances:

(d) Notwithstanding any other provision of this chapter, the commission, at a regular meeting *without the necessity of holding a public hearing*, may approve an application to renew or amend a permit if:

(1) the applicant is not applying to:

(A) increase significantly the quantity of waste authorized to be discharged; or

(B) change materially the pattern or place of discharge;

- (2) the activities to be authorized by the renewed or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (3) for NPDES permits, notice and the opportunity to request a public meeting shall be given in compliance with NPDES program requirements, and the commission shall consider and respond to all timely received and significant public comment; and
- (4) the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under § 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit.

TEXAS WATER CODE § 26.028(d). (Emphasis added). TCEQ rules implementing this statutory provision parallel the above requirements and state that, in the case of a renewal of an application, there is no right to a contested case hearing in circumstances such as are presented here:

- (5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:
 - (A) the applicant is not applying to:
 - (i) increase significantly the quantity of waste authorized to be discharged; or
 - (ii) change materially the pattern or place of discharge;
 - (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
 - (C) any required opportunity for public meeting has been given;
 - (D) consultation and response to all timely received and significant public comment has been given; and
 - (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit[.]

30 TEXAS ADMIN. CODE § 55.201(i)(5). These types of renewal applications are commonly referred to as “no change” applications. The rationale is that water quality discharge permits are subject to renewal every five years. Without this kind of provision, entities would be subject to a contested case hearing on the same permitted facilities every five years.

In this case, the City’s application is a “no change” renewal. The City is not applying to increase the quantity of its wastewaters. There is no increase in volume of waters leaving the plant or increase in pollutant load. These amounts will remain constant. Nor is the City applying

to materially change the pattern or place of discharge. The permit has been and continues to be a no discharge permit. Effluent from the waste water treatment plant will continue to be disposed of by irrigation. The same 280 acres of the adjacent golf course will be irrigated. Moreover, the activity authorized by the permit renewal will at least maintain, and possibly improve, the quality of waste authorized to be discharged.

Additionally, any required opportunity for public meeting has been provided. While the Hearing Requestor requested a public meeting, the ED determined that the standards required for a public meeting were not met. The factors for determining a public meeting are set out in 30 TAC § 55.154. This rule requires that a public meeting be held if: (1) the ED determines that there is a substantial or significant degree of public interest in an application; (2) a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held; or (3) when a public meeting is otherwise required by law. The notice of application only drew comments and a hearing request from a single person. This is proof of a lack of significant public interest. In addition, there was no request from an elected official, and a public meeting is not required by law for this type of application. Based on these factors, the ED collectively concluded that a public meeting would not be held in this case.

The City has met with the Hearing Requestor regarding his concerns on numerous occasions. A City official visited with the Hearing Requestor about his concerns on October 30, 2009, and the Mayor and City staff met with the Hearing Requestor to discuss his concerns on January 19, 2010. In addition, the City has held formal meetings to allow the Hearing Requestor to address the City Council and air his concerns. These City Council meetings were held on July 17, 2008, and November 19, 2009. In addition to these opportunities for consultation with the City, the Hearing Requestor's comments have been addressed by TCEQ. On April 15, 2010,

TCEQ specifically addressed the Hearing Requestor's comments in its "Executive Director's Response to Public Comment" filed with the chief clerk.

Finally, the City's compliance history for the past five years raises no issues regarding the City's ability to comply with any material terms of the permit. The City has received no Notices of Violation or Notices of Enforcement during the past five years. The TCEQ has determined that the City's compliance rating is average.

IV. Specific Responses to Hearing Requestor's Comments on Application

In his Request for Reconsideration, the Hearing Requestor continues to assert two failings regarding the City's application. First, he notes his proximity to the plant (approximately 200 feet east) and complains that he continues to experience nuisance conditions related to odors and vectors (flies) as a result of the City's operation of its wastewater treatment plant. Second, he asserts that certain "promised changes" by the City constitute changes to the permit and therefore, this is not a "no change" renewal application. The City responds as follows to each of these allegations.

A. The City has complied with all buffer zone and nuisance abatement requirements in TCEQ regulations and any remaining nuisance claims by the Hearing Requestor can be addressed at common law.

The Hearing Requestor points out that he is located about 200 feet from the heart of the City's wastewater treatment plant (WWTP) and that the drying beds are "located less than 50 feet from [his] property line, well inside of the minimum buffer distance noted in the draft permit." As a result, he complains that he suffers from certain nuisance conditions caused by the plant. However, as demonstrated by the City's July 1, 2009 letter to Thomas G. Haberle, Water Section Manager, the City's WWTP complies with all TCEQ buffer zone and nuisance abatement regulations. In response to a compliance evaluation investigation, the City demonstrated that its facilities at its WWTP were either grandfathered due to the date the

facilities were constructed or met the buffer zone set back requirements. A copy of that letter is attached to this response as Exhibit A.

In addition, if nuisance conditions do exist, the Hearing Requestor may seek recourse for that by filing suit in district court.

Moreover, in any case, the City has not remained idle in terms of odor issues. The City is committed to taking reasonable steps in order to combat any odor that may exist. The City has made several significant efforts over the past year to address concerns regarding odor. *See* Exhibit B. Many of these efforts have been made in response to complaints by the Hearing Requestor, and many efforts have been made to ensure that the plant is operating efficiently.

B. The “promised changes” do not constitute changes to the permit such that a contested case hearing is warranted.

Many of the “promised changes” referred to by the Hearing Requestor are the actions that the City has described in its Exhibit B. Those actions and activities are of the nature of best management practices or good housekeeping practices to ensure that its WWTP facilities are performing efficiently. These changes do not constitute a major amendment. Accordingly these actions are not of the type that would or should trigger a contested case hearing.

V. Conclusion

For the above reasons, Mr. Jody Daniel’s Hearing Request and Request for Reconsideration are without merit. Mr. Daniel attempts to expand his request for relief to his neighbors who suffer from these alleged odors. However, he has failed to identify those persons or demonstrate that they are affected persons in a manner distinct from members of the general public. Accordingly, the City of Fair Oaks Ranch respectfully requests that the Commissioners deny Mr. Daniel’s Hearing Request and Request for Reconsideration, issue the City’s application

to renew Permit No. WQ0011867001, and grant such further relief to which it has shown itself entitled.

Respectfully submitted,

Celina Romero
State Bar No. 17223900
Emily Anguamea
State Bar No. 24064608
Clark, Thomas & Winters,
A Professional Corporation
P.O. Box 1148
Austin, Texas 78767
(512) 472-8800
(512) 474-1129 (fax)

By: 
Celina Romero

ATTORNEYS FOR CITY OF FAIR
OAKS RANCH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent to the following parties on this 2nd day of August 2010.

FOR THE APPLICANT

Dan Kasprovicz
City of Fair Oaks Ranch
7286 Dietz Elkon Rd.
Fair Oaks Ranch, Texas 78015-4707
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FOR THE EXECUTIVE DIRECTOR

via electronic mail:

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REQUESTER(S)

Jody Daniel
29743 No Le Haze Drive
Fair Oaks Ranch, Texas 78015-4562

INTERESTED PERSON(S)

Franz & Gisela Hallermann
30410 Fairway Run
Fair Oaks Ranch, Texas 78015-4448

FOR PUBLIC INTEREST COUNSEL

via electronic mail:

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FOR OFFICE OF PUBLIC ASSISTANCE

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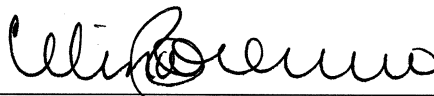
FOR ALTERNATIVE DISPUTE RESOLUTION

via electronic mail:

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Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
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FOR THE CHIEF CLERK

Ms. LaDonna Castanuela
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Celina Romero

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July 1, 2009

*Via Facsimile 210-545-4329
and Regular Mail*

Thomas G. Haberle
Water Section Manager
Texas Commission on Environmental Quality
San Antonio Regional Office, Region 13
14250 Judson Road
San Antonio, Texas 78233-4480

Re: Response to Compliance Evaluation Investigation at:
City of Fair Oaks Ranch WWTP, located on the northern border of Bexar County, west
of Ralph Fair Road and south of Cibolo Creek at the extreme side of Ralph Fair Ranch
in Bexar County; Texas Commission on Environmental Quality ("TCEQ") Permit
Number 11867-001; RN101613123; Investigation #738162

Dear Mr. Haberle:

On May 21, 2009, the City of Fair Oaks Ranch ("City") received your letter dated May 18, 2009, summarizing an investigation of the City's Wastewater Treatment Plant ("WWTP") performed by Arthur Locke with the Texas Commission on Environmental Quality ("TCEQ") San Antonio Region Office. While Mr. Locke did not note any violations as result of that investigation, he did note two additional issues on which you requested a written response from the City. Those issues are: 1) to minimize odor issues at the WWTP by submitting an odor minimization plan that includes Best Available Technology ("BAT"); and 2) to confirm the WWTP's compliance with minimum set-back and location requirements set out in 30 Tex. Admin. Code, Chapter 309 and to meet with TCEQ permits division staff in Austin to confirm compliance with these provisions. You had originally asked for a response by June 8, 2009. Due to scheduling issues related to setting up a meeting in Austin with the water quality permits division, Mr. Locke agreed to extend our time for a response to July 1, 2009. This letter constitutes our written response to those two additional issues and a report on our meeting with the water quality permits division staff in Austin.

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Thomas G. Haberle

July 1, 2009

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The City has taken all appropriate steps to address the additional issues. On June 18, 2009, we met with the following persons in the water quality permits division of the Austin office of the TCEQ:

Firoj Vahora, Team Leader Municipal Permitting Team, Wastewater Permitting Section, Water Quality Division, TCEQ;
Chris Ekoh, Senior Attorney, Water Quality, Environmental Law Division, TCEQ
Michelle Bacon, Attorney, Water Quality, Environmental Law Division, TCEQ
Arthur Locke, TCEQ San Antonio Region Office (who attended by speaker phone)

Persons who attended the meeting on behalf of the City were:

Mayor Kasprovicz, City of Fair Oaks Ranch
Roy Thomas, City Administrator, City of Fair Oaks Ranch
Ron Emmons, Public Works Director, City of Fair Oaks Ranch
Chamindra Dassanayake, PhD., P.E., Malcolm Pirnie
Celina Romero and Alex Longoria, Clark Thomas and Winters

At that meeting we had a good discussion of the WWTP's compliance with the set-back requirements of 30 Tex. Admin. Code § 309.13. As we have set out below in this letter, the City has verified compliance with the 150 foot set-back requirement established by 30 TAC § 309.13(e). Many of the City's treatment plant units are exempt from the set-back requirement. In any event, the City has determined that all its treatment plant units in fact meet the 150 foot set-back requirement as evidenced by the documents referenced below. The TCEQ water quality permits division agreed with our analysis and requested a copy of the deeds and other recorded instruments demonstrating compliance with the set-back requirements. Those items are attached to this letter and discussed below.

As to the request to submit an odor plan, the City is submitting with this letter a plan to minimize significant odors at its WWTP. That odor plan is attached to this letter as Exhibit A. However, it does not appear that such a plan is required for this facility. Section 309.13(e) sets out alternative provisions that must be met as a compliance requirement to abate and control a nuisance of odor – one of which is a nuisance odor prevention request and another is a demonstration that the WWTP meets the buffer zone set-back requirements of 150 feet. Since the City's WWTP already meets the 150 foot set-back requirement, it is not required to also submit an odor plan under § 390.13(e). Moreover, there is no additional requirement that such a plan include BAT in this instance. BAT applies to federal water discharge permits, and the permit at issue here is a state-only, zero-discharge permit. Accordingly, there is no applicability requirement for BAT. Nonetheless, the City recognizes that it is important to address the concerns of its neighbors and, in an extra effort of good-faith, has developed and is submitting herein a plan to further address the odor complaints that have been received at the site.

Thomas G. Haberle

July 1, 2009

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Buffer Zone Compliance

A wastewater treatment plant unit constructed after March 1, 1990 may not be located closer than 150 feet of the nearest property line. See 30 Tex. Admin. Code §§ 309.13(e), (h). Owners of wastewater treatment plant units can satisfy this requirement by providing sufficient evidence of legal restrictions prohibiting residential structures within 150 feet of their units. *Id.* § 309.13(e)(2). Sufficient evidence of legal restrictions may, "among others," take the form of restrictive easements, covenants, deed restrictions, or certified copies of original private agreements. *Id.*

Many of the City's wastewater treatment plant units were constructed prior to March 1, 1990 and, therefore, are exempt from the 150 feet set-back requirement. In any event, current legal restrictions on property encircling the City's treatment plant units satisfy the set-back requirement. Those restrictions are as follows:

- Owners of property to the east and in part of the property to the south of the WWTP are prohibited from constructing any building within 150 feet of the plant's property line. See Exhibit B, Bexar County Records Volume 07220, Page 1635 (referencing Bexar County Plat Records Volume 9537, Page 9) and Page 1637, section A(4).
- Owners of property to the west of the WWTP are prohibited from constructing any building within 150 feet of the plant's property line. See Exhibit C, Bexar County Records, Volume 07113, Page 841 (referencing Bexar County Plat Records, Volume 9538, Page 12) and Page 846, section A(26).
- Owners of property to the south of the WWTP operate a golf course designed to service and compliment the surrounding residential developments. This property is subject to deed restrictions which prohibit residential development. See Exhibit D, Bexar County Land Records, Volume 3859, Pages 0725, 0737, 0757. A small piece of a narrow 0.28 acre slip of land is also being used for golf course purposes and is not practically or legally suitable for the construction of residential structures.
- The City of Fair Oaks Ranch owns the property to the north of the WWTP. See Exhibit E, Bexar County Land Records, Volume 7294, Pages 1756, 1764.

Based upon the documents referenced above, there is sufficient evidence of legal restrictions prohibiting residential structures within 150 feet of all the City's wastewater treatment plant units. Thus, the WWTP is in compliance with the buffer zone requirements established by 30 Tex. Admin. Code § 309.13(e).

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Thomas G. Haberle

July 1, 2009

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To conclude, the City of Fair Oaks Ranch has taken all steps and actions requested by the TCEQ Region Office to address the "additional issues" raised in the recent investigation of its WWTP. The City is committed to maintaining compliance with all applicable TCEQ rules and regulations. If there is any additional information or action that remains to be taken, please do not hesitate to call.

Due to the voluminous nature of the exhibits, they will be included only in the mailed set of this response.

Very truly yours,



Celina Romero

Enclosures

cc: Roy Thomas, City Administrator, City of Fair Oaks Ranch (*via regular mail*)
Chamindra Dassanayake, PhD., P.E., Malcolm Pirnie (*via regular mail*)
Michelle Bacon, Attorney, Water Quality, Environmental Law Division, TCEQ
(*via regular mail*)

EXHIBIT B

CITY OF FAIR OAKS RANCH HOUSEKEEPING ACTIVITIES AT WASTEWATER TREATMENT PLANT TO MINIMIZE ODOR, NOISE AND VECTORS

1. Relocated the drive-way entrance to the drying bed from the east end to the west end of the bed. Formerly the entrance was on the east end, which is closer to the property line than the west end. Moving the location of the drive-way reduces the noise generated from equipment used in the drying beds heard by persons occupying adjacent tracts.
2. Site visit to the City of Boerne Wastewater Treatment Facility to view plant operations. Collected a sample of aggregate material, chad, used in the sludge drying beds (instead of sand).
3. Site visit to the SAWS Dos Rios Water Recycling Facility. Met with the Sludge Process Manager and viewed their operation. Collected information regarding sand specifications used in sludge beds and methods for reducing the fly population.
4. Removed all sand from sludge drying bed #3. Inspected drain piping exterior visually and internally via camera to determine if any blockages preventing proper flow. None were found. Installed new sand in sludge drying bed #3 using specifications from SAWS Dos Rios facility. Found that current sand works just as well or better than the SAWS specified sand.
5. Hauled off-site all liquid sludge for approximately eight weeks (using SOS Sludge Haulers) while improvements, modifications, and investigations were made to the sludge drying beds.
6. Purchased two tillers to break up and loosen the sand in the drying beds after sludge removal and prior to sludge wasting operation.
7. Purchased and installed turf tires for tractor to use within the drying beds. This practice allows quicker removal of sludge from the drying beds and minimizes the compaction effects on the sand.
8. Relocated the sludge dumpster more into the center of the plant, further away from the east property line.
9. Sludge drying beds are cleaned frequently. Sludge in the dumpster is removed from the site weekly so that none is stored on-site over a weekend.
10. Commenced a practice of collecting odor samples using a Nasal Ranger on the plant site and along the plant entrance road. Random collections are on-going.
11. Purchased a weather station and installed it in close proximity to the sludge drying beds. The weather station collects temperature, humidity, rain, and wind direction.
12. Installed solid wall fence (Fencecrete) on the plant property line as well as a solid wall screen around two-thirds of the sludge drying beds. This wall was specifically designed to disrupt the air flow away from Mr. Daniel's property (the Hearing Requestor in this matter).
13. Introduced Enviro-Culture (an enzyme additive) to the influent process stream. Recently changed the location of the additive to the Collection System Lift Stations. This enzyme is designed to attack and reduce the odor causing organisms. Results are undetermined at this point.
14. Added 90-degree elbows downward on all pipe discharges in receiving basins to minimize wastewater flow exposure to atmosphere and reduce splash effects and off-gas potential.

15. Started using a wasp larvae to reduce the fly population around the sludge drying beds and the bar screens.
16. Changed the bar screen cycle to run twice as often.
17. Changed operation of mixers in the carrousel basin from an alternating sequencing setup to having both mixers run all the time.
18. Planted several trees and shrubs within the plant-site along the south and east property lines for plant beautification upon a complaint from Mr. Daniel that solid wall fence was not attractive when viewed from his property.